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Prosecution Discovery in the U.S.: A Balancing Perspective

Christopher Slobogin

Discovery by the Prosecution in the United States: A Balancing Perspective

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In *R. v. Stinchcombe*,[1] the Supreme Court of Canada held that the Crown has a legal duty to disclose all relevant information, exculpatory and inculpatory, to a defendant charged with an indictable offence. Left undiscussed by the decision, and by Canadian decisional and statutory law generally, is the scope of discovery *against* the defence. A description and analysis of the American experience in this regard may be of interest to Canadian practitioners and academics.

Prior to the middle of this century, defence attorneys and prosecutors in the United States depended on preliminary hearings and informal exchanges to obtain information about the other side's investigative efforts. Since the adoption of Rule 16 in the *Federal Rules of Criminal Procedure*, in 1946, the scope of discovery has expanded considerably, in an effort to eliminate surprise and improve the accuracy of the fact-finding process. All of the states have followed the federal lead and in many cases have gone far beyond it.

The law concerning defence discovery against the government has been the most uniform.[2] The U.S. Supreme Court has held, as a constitutional matter, that information which has a "reasonable probability" of changing the "result" of a case in the defence's favour must be disclosed to the defence,

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[1] (1991), 68 C.C.C. (3d) 1, [1991] 3 S.C.R. 326, [1992] 1 W.W.R 97.

[2] For a general exposition of discovery rules for both the defence and prosecution, see C. Whitebread & C. Slobogin, *Criminal Procedure*, 3rd. ed. (1993), Chapter 24; W. LaFave & J. Israel, *Criminal Procedure* (1984) Chapter 19.

regardless of state law on the matter.[3] This standard does not require, as *Stinchcombe* apparently does, that all relevant information be handed over to the defence.[4] But a fair number of American jurisdictions go beyond the constitutional minimum, requiring that the prosecution surrender other information deemed "material" to the defence, not just "exculpatory" information. For instance, virtually every state and the federal courts provide by rule or statute that the defence is entitled to: (1) any statements by the defendant possessed by the prosecution; (2) the defendant's criminal record, and (3) documents, photographs, tangible objects and the results of physical and mental examinations and other tests that the prosecution intends to use against the defence. Many jurisdictions also require the prosecution to give the defence any witness statements it possesses. At the same time, to prevent the defendant from intimidating witnesses or concocting testimony, many jurisdictions allow the prosecution to refrain from giving the defence the names and addresses of prosecution witnesses, or statements made by them, until the time of their testimony at trial.

Prosecution discovery of the defence's case, the topic of this article, has also expanded considerably since 1946. Initially, in many jurisdictions the prosecution was entitled to information from the defence only if the defence first requested information from the prosecution (the so-called "reciprocity doctrine"), or when the defendant planned to raise certain types of defences (*e.g.*, an alibi or insanity defence). But many jurisdictions now grant the prosecution an "independent" right to discovery well beyond these limited circumstances. As Professor Mosteller has documented, many states require, regardless of any discovery request by the defence: "(1) a specification of all defenses the defendant will raise; (2) the names and addresses of all witnesses that the defendant intends to call at trial; and (3) all statements of defense witnesses,

[3] The leading case in this regard is *Brady v. Maryland*, 373 U.S. 83 (1963). For the Supreme Court's latest exposition on the issue, see *United States v. Bagley*, 473 U.S. 667 (1985).
[4] See *United States v. Bagley, ibid.*

including memoranda of unsigned oral statements."[5] Some states also require the defence to create and give to the prosecution statements from witnesses if they do not already exist, and others require the defence to surrender any statements from government witnesses in its possession, whether or not it intends to use them for impeachment purposes.

In examining the complicated issues raised by American law governing prosecution discovery, this article tries not only to explain the law, but to critique it as well, and occasionally also offers proposals for reform. Prosecution discovery of the following items is taken up: (1) notice of defences and supporting witnesses; (2) statements of witnesses; (3) names of non-witnesses who may have information damaging to the defence; (4) tangible and documentary evidence. Before examining these various types of discovery, it is useful to discuss briefly whether the prosecution should be entitled to *any* type of discovery.

The Case for Barring Prosecution Discovery

The argument against prosecution discovery proceeds from the premise that, in its contest with the defence, the prosecution has a significant advantage. The prosecution has entire police departments to assist in its investigation; the defence is fortunate to have any investigative resources outside the defence attorney. Furthermore, in the United States at least, the prosecution may subpoena witnesses and documents through the grand jury (and in some states need not even resort to the grand jury).[6] The defence has no such power. Given these resources, the argument goes, the prosecution should be forced to make its case without any help from the defendant. If the state's case cannot stand on its own, it should not be brought.

One can add to this argument assertions about potential

[5] R. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance* (1986), 74 Cal. L. Rev. 1567 at p. 1570. This is the best single article on the issue. See also, E. Tomlinson, *Constitutional Limitations on Prosecutorial Discovery* (1986), 23 San Diego L. Rev. 993.

[6] For a description of the grand jury subpoena power, see Whitebread & Slobogin, *supra*, footnote 2, § 23.05(a). In Florida, the prosecutor is authorized to issue subpoenas: Fla. Stat. § 914.04.

abuse of information discovered from the defence. If the prosecution learns of the defence's theory of the case prior to trial, it can manipulate its own witnesses accordingly. If it learns the identity of defence witnesses, it can intimidate them.[7] In short, adding to the state's power is not only unnecessary in itself but increases the chances of abuse.

To the latter points, one might respond that the appropriate way of guarding against unethical and unlawful behaviour by the prosecutor or police officials is direct sanctions on the offending party, not an absolute prohibition on discovery. If there is a fear that agents of the state will intimidate witnesses, the state could be barred from contacting them except through a deposition process, with defence counsel present.

The larger point is harder to contest, however. Given its awesome resources, does the state really need discovery from the defence? Perhaps, despite its investigative power, the state will occasionally be surprised by a defence witness or a defence argument. But in cases where an unanticipated defence tactic will work significant unfairness, the prosecutor can move for and the may court grant a continuance. Most importantly, forcing the prosecution to rely on its own resources will help ensure that only credible charges are brought. The state will not be tempted to indict individuals on weak evidence in the hope that witnesses provided by the defence might offer further leads.

In short, a strong case can be made for maintaining the *status quo* in Canada, particularly since the prosecution does not seem to be hampered in any significant way by current practice (this an assertion made after talking to several judges at the 1993 CIAJ conference in Vancouver). On the assumption, however, that formal rules permitting prosecution discovery will be considered, the following analysis of American law and practice is offered.

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[7] One colleague from New Jersey told me that, upon learning the identity of defence witnesses, law enforcement officials in that state have been known to "visit" the witness in an effort to deter testimony. Another colleague has suggested that even *legitimate* attempts by the prosecution to follow up on defence discovery can be intimidating, merely because the witness, although perhaps telling the truth about the defendant, may in other ways be "operating on the edge of legality," and thus upset enough by contact with the government to avoid testimony altogether.

Notice of Defences and Witnesses

Three Theories. Under American law, any discussion of prosecution discovery must start with the Fifth Amendment, which states that "No person . . . shall be compelled in any criminal case to be a witness against himself." One might argue that any prosecution discovery is prohibited by this language, because it may compel self-incriminating information from the defendant. But there are at least three possible justifications for concluding otherwise: (1) the accelerated disclosure rationale; (2) the balancing rationale, and (3) the waiver rationale. As discussed below, the waiver theory is not coherent and the accelerated disclosure rationale is overbroad. The balancing rationale, despite its vague contours, is the most sensible. These rationales are developed here in connection with prosecution discovery of the defendant's defences and supporting witnesses, and are then applied throughout the remainder of this article.

(1) Accelerated Disclosure Analysis. The leading United States Supreme Court decision on discovery is *Williams v. Florida.*[8] There the defendant claimed that a state statute that required the defendant to give notice of an alibi defence and the witnesses who would support it violated the Fifth Amendment. But the Supreme Court rejected this argument, by a margin of 6:2 (Justice Blackmun not participating). According to the court, the statute exerted no more compulsion to produce alibi evidence than does the need to use the alibi testimony to avoid conviction at trial itself, and

> "Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense, any more than it entitles him to await the jury's verdict on the State's case-in-chief before deciding whether or not to take the stand himself."

One might wonder why the court did not simply hold that notice of an alibi defence and witnesses is not testimony "against" the defendant, but rather testimony *for* the defendant, which would mean that compelling it does not violate the

[8] 399 U.S. 78 (1970).

language of the Fifth Amendment. Probably it did not because such disclosures *can* produce incriminating information. For instance, an alibi witness can help the prosecution establish that the defendant was in the vicinity of the crime at the time it happened (even though the witness may insist the defendant was not at the precise spot the crime occurred). Or the witness might provide the government with information about other potential witnesses or crimes committed by the defendant. Finally, as occurred in *Williams* itself, pre-trial notice might help the prosecution gather evidence that can be used to impeach the alibi witnesses.

As Justice Black pointed out in dissent, all of these possible prosecution uses of alibi witnesses are more likely when the defendant must inform the prosecution of the alibi before, rather than during, trial. But the majority countered by noting that, if notice of the defence is not given prior to trial, the prosecution can always seek a continuance during which it can take the deposition of the alibi witness and find rebuttal evidence. The court concluded, "if so utilizing a continuance is permissible under the Fifth and Fourteenth Amendments, then surely the same result may be accomplished through pretrial discovery, as it was here, avoiding the necessity of a disrupted trial".

Contrary to the court's reasoning, there is a significant difference between a pre-trial notice requirement and a practice forcing the prosecution to rely on continuances: under the former regime, the defence is required to decide what its theory will be prior to seeing the prosecution's trial case and perhaps even prior to receiving the names and statements of the prosecution's witnesses (depending upon the jurisdiction's rules governing defence discovery). Thus, under a notice regime, the defence is in the position of disclosing potentially incriminating information that it may *never* have disclosed had there been no notice requirement. The only solution to this change-of-defence scenario is to prevent the prosecution from using any information it obtained through the now-irrelevant notice, but that solution would probably be impossible to implement; it requires identifying and then tracing the influ-

ence of any leads the prosecution obtained through the defence's alibi witnesses.

The *Williams* court either disregarded the dilemma described above or believed it negligible. As a result, it established what could be called the "accelerated disclosure" exception to the right to remain silent. Under this exception, the defence can be required to disclose prior to trial any information it would disclose during trial, without violating the Fifth Amendment. Although *Williams* itself was limited to approving notice of alibi statutes, its reasoning has been applied by lower courts to permit prosecution discovery of virtually any information the defence will use at trial (short of the defendant's own testimony), ranging from notice of other defences to names and statements of defence witnesses and tangible evidence.[9]

(2) Balancing Analysis. A second way of justifying the result in *Williams* which is just as persuasive, if not more so, is to admit that notice-of-alibi statutes may compel more incriminating information than trial but to find this harm outweighed by the legitimate state need to avoid surprise at trial and the inefficiency caused by the granting of a continuance. The Supreme Court did not rely on this rationale in *Williams*, but in *Estelle v. Smith*,[10] decided 11 years later, the court seemed to endorse a similar concept in the context of psychiatric evaluations. There, the court, noting several lower court decisions upholding state-requested evaluations of defendants who had raised insanity defences, stated that "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case." With this language and its apparent acceptance of state-requested pretrial evaluations of insanity, the court seemed to countenance not only state compulsion of statements from defendants asserting an insanity defence (a topic to be discussed in more detail below), but also notice-of-insanity defence statutes (because how else would the state know to request an

[9] See Mosteller, *supra*, footnote 5, at pp. 1570-1.
[10] 451 U.S. 454 (1981).

evaluation?). The ground for both conclusions appeared to be, in the words of another Supreme Court opinion on the Fifth Amendment,[11] that a "fair state-individual balance" required them. In other words, because the state can show that rebutting an insanity defence is virtually impossible without significant preparation, it should be able to force pre-trial notice of such a defence.

The difficulty with this "balancing" analysis, of course, is measuring the strength of the state's need and deciding how to "balance" this need against any interest in secrecy the defendant may have. For present purposes, it is sufficient to note that the state's need for notice about psychiatric (and alibi) defences and supporting witnesses could be said to outweigh the defendant's interest in remaining silent. How balancing works in other contexts will be explored at later points in this article.

(3) Waiver Analysis. A final way in which one could analyze *Williams* (and *Estelle*) is through waiver theory. That is, the defendant, by raising an alibi or insanity defence, might be said to waive the Fifth Amendment privilege. The problem with this approach is that such a waiver cannot be considered valid, because it is not "voluntary". As the Supreme Court has held,[12] a person cannot be forced to choose between two constitutional rights. If, contrary to the reasoning under the accelerated disclosure and balancing approaches, the defendant *does* have a right to remain silent about his defences and the witnesses who will support them, a notice statute would make him choose between that constitutional right and his right to present a defence, guaranteed in the U.S. by the Sixth Amendment (which protects, *inter alia*, the right to effective assistance of counsel, the right to confront accusers and the right to present evidence). The better way to explain *Williams* and *Estelle* is by straightforwardly concluding that the defend-

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[11] *Murphy v. Waterfront Com'n of New York*, 375 U.S. 52 (1964), stated "our sense of fair play . . . dictates 'a fair state-individual balance by requiring the government to leave the individual alone *until good cause is shown* for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load'." Quoting 8 Wigmore, *Evidence* (McNaughton rev., 1961), p. 307 (emphasis added).

[12] See, *e.g.*, *Simmons v. United States*, 390 U.S. 377 (1968).

ant who wants to raise an alibi or insanity defence has no right to remain silent about that fact. Then the notice statutes do not force a choice between two constitutional rights.[13]

Note that the waiver notion also appears to underlie the popular reciprocity doctrine described in the introduction: the defence should be able to control its information until it waives that control by requesting information from the prosecution. But, again, it is hard to characterize as voluntary a defence decision to disclose information when the reason it does so is because it wants information from the prosecution. If one posits a defendant's right to remain silent about all aspects of his or her case, the defendant here is being forced to choose between that right and the right (recognized explicitly in Canada via *Stinchcombe*) to present an effective defence through discovery of the prosecution's case. Again, waiver analysis does not work.

The reciprocity doctrine also does not fare well under the accelerated disclosure and balancing approaches. The former approach offers no support for the doctrine, because it looks solely to whether the defendant will use evidence at trial, not at whether the defendant has requested information from the prosecution. And the reciprocity idea makes no more sense from a balancing perspective. If the rationale for discovery is the avoidance of surprise and the thorough preparation of adversaries, the prosecution should not be barred from obtaining information it needs simply because the defence decides it does not need anything from the prosecution. By the same token, the defence should not necessarily have to surrender information in its possession merely because it finds (as will almost always be the case) that the state, with its superior investigative resources, has evidence that it wants. As noted above, many American jurisdictions appear to have concluded that reciprocity notions should not drive discovery.

Application to Other Defences. Although waiver analysis is deficient, both accelerated disclosure and balancing analysis suggest that notice-of-alibi and notice-of-insanity defence

[13] Of course, if one disagrees with the conclusion that there is no right to remain silent about such matters, then the notice-of-alibi statute is deficient under waiver analysis, unless one concludes that the defendant *can* be forced to choose between two constitutional rights.

statutes are constitutional. Assuming so, do these approaches also justify statutes which require notice of other defences, such as self-defence or duress? As noted above, many lower courts have upheld such statutes, under the accelerated disclosure rationale. Under a balancing approach, on the other hand, one might argue that the state's need to know whether a defendant is going to assert these types of claims is not as strong as in alibi or insanity cases. While the alibi and insanity defences are hard to anticipate and require a fair amount of preparation to rebut, the prosecution will usually know from its own investigation whether most claims, *e.g.*, a self-defence or intoxication claim, might be made.

Yet the fact remains that even these latter types of claims can be a surprise to the prosecution. Assuming that one does not endorse the argument advanced at the outset of this article — that the prosecution is never entitled to defence information because of its mammoth resources — statutes which require notice of defences and identification of witnesses who will support the defence's case might well be supportable even under a balancing theory (at least if the defence is given comprehensive discovery of the prosecutor's case first and thus is allowed to fine tune its strategy before such notice).

A final question is whether the state can force the defendant to reveal prior to the trial whether *he* is going to testify in support of a defence. Since the prosecution will find out the answer to this question at trial, the accelerated disclosure rationale once again suggests the information is discoverable. But the balancing approach suggests another answer. As developed below, in contrast to what it may do with alibi or insanity witnesses, the state may not force a defendant to reveal the content of his testimony prior to trial. Given this prohibition on pre-trial contacts, notification that the defendant will testify is of minimal value to the prosecution and would probably not be justifiable under a balancing approach.[14] In *Brooks v.*

[14] One colleague of mine has noted that, at least in multi-defendant cases, knowing which of the defendants will testify can be extremely helpful even if the precise content of the testimony is unknown, as preparing cross-examinations of all defendants can be extremely time-consuming. Perhaps an exception should be made in these cases.

Tennessee,[15] the Supreme Court may have suggested as much, although the opinion is subject to numerous interpretations.[16]

Statements from Witnesses

Statements from defence witnesses are usually divided into those the prosecution attempts to create on its own and pre-existing statements it attempts to obtain from the defence.

Prosecution-Created Statements: Because deposing the defendant prior to his testimony would be helpful for impeachment and avoidance-of-surprise purposes, one could easily argue, under either the accelerated disclosure or the balancing rationale, that the prosecution should be able to conduct such depositions. But the Supreme Court has clearly indicated that an accused has a right to remain silent prior to trial, even when he is represented by counsel and not in danger of being physically or psychologically coerced.[17] The rationale for this rule, and for the language in the Fifth Amendment upon which it is based, is complex and beyond the scope of this article.[18] The important point for present purposes is that the Fifth Amendment prevents discovery in this context.

However, as noted above, *Estelle v. Smith* does permit the state to force pre-trial disclosures from a defendant *who is raising an insanity defence.* While this exception might be explicable as an "accelerated disclosure" situation, it is easiest to justify under balancing analysis. Consider the following analogy: While the defendant may refuse to testify on Fifth Amendment grounds, most would agree that he should not be able to testify and then refuse to be cross-examined by the

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[15] 406 U.S. 605 (1972).

[16] In *Brooks*, the court found unconstitutional a state statute requiring that, if the defendant chose to testify, he must do so at the beginning of his case, after the state rested. This decision could be read to mean that the state cannot force the defendant to reveal if he will testify prior to trial. Or it could merely recognize that the state cannot force particular trial tactics on the defendant.

[17] See, *e.g.*, *Lefkowitz v. Turley*, 414 U.S. 70 (1973): an individual has the right to refuse "to answer official questions put to him in any . . . proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings".

[18] See generally, Stephen Schulhofer, "Some Kind Words for the Privilege Against Self-Incrimination" (1991), 26 Valparaiso L. Rev. 311 at pp. 327-36.

prosecution;[19] in any event, the Supreme Court has so held, on the ground that allowing such a refusal would upset a "fair state-individual balance".[20] Similarly, allowing the defendant claiming insanity to "testify" through his expert without being subjected to some pre-trial inquiry by agents of the state would upset the state-individual balance; because the key evidence in an insanity case comes from the defendant, allowing him to avoid a state evaluation would seriously disadvantage the prosecution.[21] At the same time, balancing analysis suggests that the state should be permitted to use disclosures obtained during this interview only to address the issue presented by the defendant — the insanity defence — and not other issues.[22]

While defendants may be interviewed prior to trial only under limited circumstances such as those noted in *Estelle*, other defence witnesses can be deposed any time the prosecution wishes to do so, once it has discovered who they are. The Fifth Amendment does not prohibit such interviews because, even if they are compelled, the compulsion is directed at the witness, not the defendant. Thus, in contrast to state attempts to depose the defendant, in this situation the defendant has no constitutionally recognized interest to range against the state's interest in obtaining information.

Defence-Created Statements: Under an accelerated disclosure rationale, prosecution discovery of statements the defence obtains from its own witnesses would depend upon the nature of the statements. If the statements merely anticipate testimony at trial, they would be discoverable. On the other hand, since those statements that are unfavourable to the defence will presumably not be presented by the defence at trial, the accelerated-disclosure rationale would prohibit prosecution access to them. Most state statutes permitting prosecution

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[19] Note that in some countries, such as Australia, a defendant can give "unsworn" testimony, in which he may make a statement, not under oath, without fear of cross-examination.

[20] *Brown v. United States*, 356 U.S. 148 (1958).

[21] The counter-argument would be that the state does not need an interview with the defendant to combat the insanity defence; cross-examination of the defence expert and evidence from lay witnesses should be deemed sufficient.

[22] This is the rule in virtually every jurisdiction: see generally, C. Slobogin, *Estelle v. Smith: The Constitutional Contours of the Forensic Evaluation* (1982), 31 Emory L.J. 71 at pp. 107-9.

discovery of witness statements do not differentiate between favourable and unfavourable parts of the statements, however.[23] State courts addressing the constitutionality of such provisions have not made the distinction either.[24]

Balancing analysis, on the other hand, might dictate that witness statements obtained by the defence remain *un*discoverable, regardless of content. Under this analysis, one first asks whether the prosecution needs pre-trial discovery from the defence. When the item sought is a pre-existing statement from a defence witness, the answer to this question will generally be no, for the simple reason that, as noted above, the prosecution can almost always obtain its own statement from the witness. One might respond to this argument by speculating that statements to defence attorneys will be more candid or accurate. But, in the typical case, there is no reason for a witness who is not a defendant to lie to the government (at least anymore than he might lie to the defence); furthermore, if the witness fabricates something during a prosecution *deposition*, the risk of a subsequent perjury charge is substantial. One might also respond by noting that it is inefficient to make the government interview a witness who has already been interviewed by the defence. Normally, however, any witness who is significant will be interviewed by both sides; in any event, the cost to the government of such interviews is normally minimal. In short, the only significant state interest behind a rule requiring defence disclosure of witness statements is that it *occasionally* gives the prosecution more information than it otherwise would have obtained through reasonable investigation.

It is unlikely this interest outweighs the inhibiting effect such a rule could *routinely* have on defence attorneys' desire to obtain such statements. Those who question whether such an inhibiting effect exists need merely look at the civil system, where a strong work product privilege has been recognized for some time, based on the premise that attorneys' investigations will otherwise be compromised. For instance, the

[23] See, *e.g.*, Fla. R. Crim. Pro. 3.220(d)(2)(i).
[24] See Mosteller, *supra*, footnote 5, at p. 1570.

federal rules prohibit discovery of documents prepared by attorneys in preparation for litigation, unless the adversary can show a substantial need for them.[25] A constitutionally based argument in the same vein could be derived from the Sixth Amendment which, as noted above, guarantees the defendant the right to effective assistance of counsel. If the defence attorney knows witness statements will have to be turned over to the prosecution, he may be deterred from fully investigating the witness' story.

However, a balancing analysis would not necessarily deny the prosecution all access to statements from defence witnesses. For instance, analogous to the civil rule, if the prosecution could show a substantial need for such a statement (*e.g.*, the witness has died, or refuses to talk to the prosecution), then it could be discovered. As noted above, instead of adopting this more sensitive approach, most states grant the prosecution automatic pre-trial access to defence witness statements. In some states, this stance results from application of the reciprocity doctrine, the incoherence of which was discussed above. In other states, this position is not even limited by a defence request for information.

The "unfairness" of allowing prosecution access to defence-created statements is exacerbated by the fact, noted at the beginning of this article, that in many jurisdictions the prosecution can withhold statements of its witnesses until trial, whether or not it can show a concern about witness intimidation. A truly "reciprocal" approach would at least grant the defence the same control over its information. This approach, it is submitted, is the correct reading of *United States v. Nobles*,[26] a case which has given commentators much difficulty. There, the defence attorney wanted to impeach two eyewitnesses for the prosecution with references to a report prepared by his investigator, containing descriptions of previous interviews with the witnesses. But when the defence

[25] Fed. R. Civ. Pro. 26(b)(3). Admittedly, Rule 26(b)(4) permits a party to require answers to interrogatories about the facts and opinions of experts who will be used by the defence. But these answers are not statements or reports from the experts. The latter can only be discovered if substantial need is shown.

[26] 422 U.S. 225 (1975).

called the investigator to the stand, the trial judge ruled that "if he testifies in any way about impeaching statements made by either of the two witnesses", then the government would be entitled to look at those portions of the report that contained the alleged impeaching statements (to be excerpted from the report by the judge after an *in camera* review). When defence counsel refused to submit the report, the investigator was not allowed to testify. On appeal the defendant argued that the trial court's attempt to compel the disclosure of the report and its subsequent prohibition of the investigator's testimony violated the privilege against self-incrimination, the Sixth Amendment right to produce evidence and confront accusers, the Sixth Amendment right to effective assistance of counsel, and the work-product doctrine.

The Supreme Court rejected all of these arguments. The Fifth Amendment was not violated because the court order did not compel statements from the defendant, nor compel the defendant to reveal the identity of witnesses unknown to the prosecution. The confrontation and compulsory process clause arguments were rejected because "[t]he Sixth Amendment does not confer the right to present testimony free from the legitimate demands of the adversarial system; one cannot invoke the Sixth Amendment as a justification for presenting what might have been a half-truth". Similarly, to the defendant's argument that the trial court's approach would "inhibit" counsel's investigative efforts, the court stated: "The short answer is that the disclosure order resulted from [the defendant's] voluntary election to make testimonial use of his investigator's report." Finally, the court held that "by electing to present the investigator as a witness [the defendant] waived the [work product] privilege with respect to matters covered in his testimony".[27]

It might be argued, under an accelerated disclosure rationale, that since *Nobles* permits the prosecution to obtain unfavourable aspects of a witness' observations at trial, it should be

[27] Note that waiver analysis is appropriate here, unlike in *Williams*, because the defendant clearly does not have a right to present "half-truths" through witnesses other than himself. He can be forced to choose between presenting a witness' full story and foregoing use of the witness altogether.

able to obtain this information prior to trial. The better reading of *Nobles*, however, is to limit it to the trial context. Until the witness has actually told the "half-truth" — which is the situation in which the trial judge in *Nobles* contemplated giving the report to the prosecution — the state has no need for that witness' prior statements or observations (especially since it can interview the witness prior to trial). At the same time, such a rule ensures that the defence is not inhibited in its investigative efforts, which should be as wide-ranging as possible. Rather, under this reading of *Nobles*, what is inhibited are defence attempts to present witnesses while refusing to reveal their prior inconsistent statements or observations, which is not justifiable under any analysis (except as to the defendant, who is protected by the Fifth Amendment and the attorney-client privilege).[28]

However one comes out on the necessity for providing the prosecution with written or oral statements of defence witnesses, the provisions found in some states, requiring the defence to *create* such statements when they have yet to be made, seem insupportable. First, as developed further below, directing the defendant to manufacture such statements might run afoul of the Fifth Amendment's prohibition against compelling a defendant to testify against himself. Even if it does not, this latter type of provision is unjustifiable under a balancing approach. As explained above, giving the prosecution *pre-existing* statements could be justified, if only weakly so, on the ground that it increases the amount of information the prosecution is likely to obtain, provides more accurate statements, and avoids duplication of effort. When the statements are created at the prosecution's request, however, none of these interests are furthered, given the fact that the prosecution can as easily take its own statements.

[28] Note that, shortly after *Nobles*, the Supreme Court promulgated a new criminal rule requiring both the defendant and the government to produce the prior statements of their witnesses after each witness had testified: Fed. R. Crim. P. 26.2. Pre-trial disclosure of such statements is not addressed. Several lower courts have held that either the work-product doctrine or the Sixth Amendment right to effective assistance of counsel prohibits forcing pre-trial disclosure of defence witness statements: *Spears v. State*, 647 Ind. 272, 403 N.E. 2d 828 (1980); *United States v. Felt*, 502 F. Supp. 71 (D.D.C., 1980).

Non-Witnesses

Although the Supreme Court has required the prosecution to divulge exculpatory information, and many states further provide that the prosecution disclose any "material" information that might favour the defence, most jurisdictions do not impose a similar duty on the defence to provide the identities or statements of people it does not intend to use in its case. Such a stance is obviously supported by the accelerated disclosure rationale. It is also generally acceptable under balancing analysis but, as usual, the reasoning under the latter approach is more subtle, as the discussion below indicates.

Discovery of Identities: In *Fisher v. United States*,[29] the Supreme Court held that the Fifth Amendment not only prevents the state from compelling self-incriminating admissions from the defendant, but also from compelling the defendant to disclose the existence of evidence against him. It further held that the attorney-client privilege prohibits compelling the defendant's attorney from surrendering such information. While the Fifth Amendment would not prevent the latter disclosure (because the Amendment is concerned only with defendant-directed compulsion), the court held that the attorney-client privilege does so, in order to avoid inhibiting discussions between attorney and client. Thus, the state cannot force the defendant or his attorney to disclose the identity of a non-witness (such as a co-perpetrator) whose existence is known because of the defendant. This result makes sense under a balancing rationale as well; although the state obviously would find the identity useful, granting discovery could easily lead to a situation in which even the defence attorney would not find out about the non-witness, since a defendant who is aware his attorney is a conduit to the prosecution will keep mum.

On the other hand, *Fisher* suggested, if the defence's knowledge about the existence of incriminating information does not come from the defendant, it is not protected by either the Fifth Amendment or the attorney-client privilege. Thus, the identity of a person who is known to the defence as a

[29] 425 U.S. 391 (1976).

result of the *attorney's* efforts (as is often the case with experts, for instance) might be discoverable, at least as far as the Fifth Amendment is concerned.

Under a balancing approach, however, the source of the defence's knowledge about a person's identity should not matter. The important inquiry is whether allowing prosecution discovery will inhibit defence investigation. If the prosecution can discover the details of every consultation arranged by the attorney, the attorney will be deterred from seeking experts and other sources of information, or at least experts and other sources who might produce unfavourable information. On this ground, some lower courts have held that the Sixth Amendment's guarantee of effective assistance of counsel protects against disclosure of non-witness identities.[30] Another reason for this position, also related to the attorney-effectiveness issue, is the damage to the attorney-client relationship that will occur if defendants see that their attorneys routinely hand over to the prosecution information which could prove damaging to the defendant's cause.

Prosecution Use of Non-Witnesses: Even though most jurisdictions do not require the defence to reveal the identity of "non-witnesses", the prosecution frequently finds out who they are through means other than the discovery process. In these cases, the issue arises whether the prosecution may use such a person as its own witness. Answering this question requires distinguishing between two different types of potential prosecution witnesses. When the witness obtained his knowledge about the case from his own observation prior to initiation of the prosecution against the defendant (*e.g.*, a co-perpetrator), the prosecution should be able to use him to full advantage; such use will not in any way inhibit preparation of the defence case. But when the person has obtained his information only because the defendant has given it to him in the course of investigating or preparing the case (*e.g.*, an expert), determining whether the prosecution should be able to use him as its own witness is more difficult.

This issue has been frequently litigated in the context of

[30] See, *e.g.*, *State v. Williams*, 80 N.J. 472, 404 A.2d 34 (1979).

insanity cases. Many courts, relying on the Sixth Amendment's guarantee of effective counsel, the attorney-client privilege or both, have said that the state may not call psychiatric experts the defence has decided not to use.[31] Others, concerned that this rule would allow the defendant to "gag" all the available experts, or simply desirous of providing the jury with all the facts, have held the opposite.[32] A few courts have extended the reasoning found in the latter cases to statements obtained by other types of experts retained by the defense (*e.g.*, polygraph experts), at least when sought for the purpose of impeaching a defendant who has taken the stand.[33]

These latter decisions are highly questionable. If state discovery of unused defence experts' identities rarely occurred, and was accidental when it did occur, then state use of the experts' findings would probably be permissible under a balancing approach; defence attorneys, knowing they would control when the expert would testify in the vast majority of cases, would still seek expert assistance. But the number of cases raising the issue indicates that prosecutors have been very successful at finding out about unused experts. Perhaps the experts contact the prosecution, perhaps an expert used by the defence refers to an unused expert in a report, or perhaps the prosecution finds out the unused expert's name from the defence attorney's motion requesting court reimbursement for the evaluation. To the extent defence attorneys fear such discovery, they will once again be inhibited from consulting any expert who might give an unfavourable opinion.

This conclusion does not mean that the prosecution can never use an expert the defence decides is unhelpful. If the prosecution can show that the expert possesses information to which it would normally be entitled, but for good reason was unable to obtain, then it should be allowed to use the expert.[34] For instance, if a defendant raising an insanity defence does not fully co-operate with the state experts, or

[31] See, *e.g.*, *United States v. Alvarez*, 519 F.2d 1036 (3rd Cir., 1975).
[32] *United States, ex rel. Edney v. Smith*, 425 F. Supp. 1038 (E.D.N.Y., 1976).
[33] *State v. Harrison*, 90 N.M. 439, 564 P.2d 1321 (1977).
[34] *Cf. Jones v. Superior Court*, 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962), a leading case on discovery of defence experts.

his interview with unused defence experts was much closer in time to the offence than the state's examination and thus more accurate in terms of data about mental state, the prosecution could probably subpoena the unused experts.[35] Or if a defence expert analyzed the blood type of a person whom the defendant claims committed the crime, but who has since disappeared, the expert's information should be discoverable. On the other hand, given the mandate of the Fifth Amendment, the state is not entitled to conduct polygraph tests of the defendant or otherwise require him to talk; thus, statements made to a defence-retained polygraph operator or similar expert are legitimately withheld from the state, even if that means the prosecution will be prevented from obtaining useful impeachment evidence. Otherwise, vigorous defence investigation and the attorney-client relationship will be significantly undermined.

Tangible Objects and Documents That Pre-Exist the Charge

To the extent a tangible piece of evidence (*e.g.*, a witness statement) is created by the defence during its investigation, its discoverability has already been discussed. Here the focus is on items that existed before the defendant is accused of crime and the investigation has commenced (*e.g.*, clothing connected with the crime, business records). Every jurisdiction requires defence disclosure of such items when the defendant plans to use them at trial. Such provisions are clearly justifiable under the accelerated-disclosure rationale. They are supportable under balancing analysis as well, because they provide the prosecution with information for which there is no other direct source. While the prosecution can interview witnesses (thus supporting the conclusion reached above that the defence need not hand over witness statements), the prosecution has

[35] The American Bar Association has recommended an interesting compromise in this situation: it would permit the prosecution to obtain its own evaluation within a short time of the defence's evaluation, but would seal the results of this evaluation until the defence gives notice of an intent to raise an insanity defence: Criminal Justice Mental Health Standards 7-3.4.

no substitute for tangible items such as those involved in commission of the crime or business and personal records.

A harder question is whether the prosecution may discover tangible items and documents the defence will *not* use at trial (*e.g.*, the murder weapon, incriminating business records). This issue again raises the familiar tension between state and defence objectives. On the one hand, the unreplicability of these items means that the prosecution's need for them is at least as great, and usually greater, than its need for items the defence will use at trial. On the other, allowing discovery of such items might inhibit defence investigation.

Precedent from the U.S. Supreme Court suggests that these items will often be discoverable, if not through statutory discovery provisions then through the subpoena process. In the aforementioned case of *Fisher v. United States*, as well as in other decisions,[36] the court has made clear that the Fifth Amendment only protects against "testimony" that is "compelled" from the defendant. Tangible objects like a weapon are not "testimonial". And while documents are testimonial, when they pre-exist the prosecution's discovery request, as is the case here, their creation is not "compelled" by the government. Thus a subpoena for such items will often withstand a Fifth Amendment challenge.

The only significant caveat to this conclusion is when, as *Fisher* noted, the act of *producing* the item may be testimonial, in the sense that the defendant is admitting "This item is in my possession." If the fact the item is in the defendant's possession is an element of the prosecution's case, then forcing production of it from him *will* violate the Fifth Amendment. For example, assume the prosecution requests the defendant to produce contraband, stolen goods or a murder weapon.[37] The sought-after item itself is non-testimonial, but the act of producing the item is testimony to the effect that the defendant possesses it.

However, even this subpoena is valid if the prosecution can

[36] See, *e.g.*, *Schmerber v. California*, 384 U.S. 757 (1966).

[37] For obvious reasons, the prosecutor normally would not use a subpoena in this situation, but rather resort to a search, as discussed below. None the less, this example helps clarify the theory behind the Fifth Amendment.

guarantee it will not use the testimony (*i.e.*, "immunize" the defendant against use of the act of production by promising not to reveal where the evidence came from). Of course, in many cases involving non-documentary evidence, such as when the evidence is contraband or stolen, such immunization would render the discovery useless.[38] On the other hand, the "testimony" that the defendant possesses certain business documents or authenticates them as the business' is usually not crucial to the prosecution's case (or can be proven in some other way), so discovery in such situations is more likely to be permissible under the Fifth Amendment.[39]

Using balancing analysis one might conclude that prosecution discovery of tangible items would be much more limited than is currently the case under the court's jurisprudence. In essence, the situation at issue here is no different from prosecution attempts to learn the identities of eyewitnesses from the defendant (which *Fisher* clearly prohibits). As with the identity of potential eyewitnesses, allowing discovery of tangible items might lead the defendant to avoid disclosing their existence to the defence attorney, thus compromising attorney effectiveness. Furthermore, given its powers of search and seizure (regulated in the U.S. by the Fourth Amendment), the prosecution normally has a good chance of discovering tangible items on its own, perhaps an even better chance than it has of finding certain types of eyewitnesses (such as co-perpetrators).[40] Thus, the state should not be able to depend

[38] Not in all cases, however. For instance, a prosecutor who obtained a weapon from the defendant in this manner would not be able to state in court where it obtained the weapon, but would be able to present ballistics evidence that the weapon is the one used in the crime.

[39] A second caveat to the notion that tangible items are discoverable may be that personal papers, as opposed to business records, can never be discovered, because they fall within an inviolate "zone of privacy". See, generally, C. Whitebread & C. Slobogin, *supra*, footnote 2, §15.06.

[40] Under the Fourth Amendment, American police are required to have warrants, based on probable cause, for many types of searches, but this requirement is usually not difficult to meet. Furthermore, there are many exceptions to the warrant requirement, to the extent that roughly 95% of all searches are conducted without a warrant. See generally, Whitebread & Slobogin, *supra*, footnote 2, §§ 4.02, 4.03, 4.05(d), 5.01 and 5.03. Subpoenas are minimally regulated by the Fourth Amendment as well, see footnote 41, *infra*, but are treated separately here for reasons which should become clear below.

upon the defence for such evidence. Rather, it should be forced to rely on its search-and-seizure authority to obtain it.

Note that this approach would dramatically change American law with respect to subpoenas. Under current jurisprudence, a subpoena for documents and other tangible items may issue so long as it particularly describes the item sought; in contrast to the requirement for search warrants, the state need not show "probable cause" as to whether the defendant has the item or as to where it thinks the item is.[41] The above proposal would require the state to resort to the typical warrant procedure when the source of the item sought is the defendant.[42] It is based on the premise, which flows from balancing analysis, that the state should not be able to avoid the typical restrictions on searches (by resort to the subpoena process) unless it shows some special need for doing so.[43]

The one situation in which compelling the defendant to disclose unfavourable tangible items might be permissible under balancing analysis would be when the defendant has given the evidence (*e.g.*, the murder weapon or documents) to the attorney for "safekeeping". Then, the attorney clearly *has* had access to the evidence; moreover, prosecution access through the normal search and seizure process has been stymied.[44] Even in this situation, however, the prosecution must be specific in its discovery request. In other words, the prosecution may not routinely ask the defence attorney to turn

[41] The leading case is *United States v. Gurule*, 437 F.2d 239 (10th Circ., 1970); see also, *United States v. R. Enterprises, Inc.*, 111 S.Ct. 722 (1991) (emphasizing that, under the federal rules, a subpoena is valid so long as it is not "too indefinite" or "overly burdensome").

[42] When the source of information is a third party, the typical subpoena process could still be used.

[43] As I have argued elsewhere, "probable cause" should be flexibly defined proportionate to the intrusion involved. Slobogin, *The World Without a Fourth Amendment* (1991), 39 U.C.L.A. L. Rev. 1. Thus, searches for business documents may not require as much in the way of "probable cause" as searches for more private papers. (Of course, the defendant may also hand over documents voluntarily in order to avoid more intrusive searches).

[44] Although the prosecution could seek a warrant to search an attorney's office, just as it would to search a defendant's home, courts would resist issuing the former type of warrant, given the large amount of confidential information, most of it irrelevant to the defendant's case, that might be exposed by such a search: *Cf.* Stern & Hoffman, *Privileged Informers: The Attorney Subpoena Problem and a Proposal for Reform* (1988), 136 U.Pa. L.Rev. 1783.

over all incriminating tangible evidence in his possession that existed before the latter's investigation began. Rather, it should have to demonstrate its need for the sought-after evidence by showing that the particular item probably exists, that it has not been found by the prosecution, and that it is in the possession of the attorney. Without such a showing, the prosecution has failed to demonstrate a significant enough state interest in discovery.[45]

Conclusion

The rules governing prosecution discovery in the United States are summarized at the beginning of this article. There follows a summary of rules that arguably are more consistent with American constitutional principles:

(1) The prosecution should be able to discover any defences the defence will raise at trial, as well as the identity of supporting witnesses (other than the defendant), sufficiently ahead of trial to interview the witnesses and otherwise prepare its response.

(2) Prior to their testimony at trial, the prosecution should not be able to obtain statements made by defence witnesses to the defence, unless it can show a substantial need for them (*e.g.*, death or non-co-operation of the witness).

(3) The prosecution should not be able to obtain the identity of individuals the defence will not use as witnesses. If it discovers the identity of such a person through other means and that person knows about the case solely because of the defence's investigation (*e.g.*, a psychiatric expert), it may use that person as a witness only if it can show he possesses information which is now inaccessible and to which the prosecution would have been entitled (*e.g.*, the mental state of the defendant just after the offence).

[45] It should be noted that, in some jurisdictions, the attorney may be ethically compelled to hand over evidence in such situations: *Cf. State, ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964).

(4) The prosecution may discover tangible items (*e.g.*, documents) that pre-existed the defence's investigation if: (a) they will be used by the defence at trial; or (b) the prosecution can convince a judge that they are in the defence attorney's possession. Other attempts to obtain such items should be regulated by the Fourth Amendment's warrant and probable cause requirements.